A

TETUAN PUTRA GILL

v.

HIJAZ REFINERY (PAHANG) SDN BHD & ANOR

B

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[SUIT NO: S1(S3)-22-508-1997]
10 JULY 2007

C ***LEGAL PROFESSION:*** *Remuneration - Costs - Claim for fees - Applicability of Sixth Schedule to Solicitor's Remuneration Order 1991 - Whether amount claimed for reasonable - Whether plaintiff did work for defendant on voluntary basis - Whether first defendant could dispute quantum of bill - Whether plaintiff's claim barred by s. 124 Legal*
D *Profession Act 1976 - Whether plaintiff entitled to payment - Legal Profession Act 1976, ss. 126, 128(2)*

CIVIL PROCEDURE: *Striking out - Application for - Rules of the High Court 1980, O. 18 r. 19 - Application made after substantial lapse of time - Affidavit with no probative value - Whether application allowed*
E

By a writ of summons and the statement of claim dated 12 November 1997, the plaintiff claimed against the first defendant for the sum of USD2,000,000 or equivalent in Ringgit Malaysia due under an agreement on fees; or in the alternative, the sum of
F RM2,629,960.70 payable under the plaintiff's bill No. 126/12/95 dated 7 December 1995 posted to the first defendant by AR Registered on 7 December 1995 and received by the first defendant on 8 December 1995. The plaintiff was a firm of advocates and solicitors. By submission on its behalf, the plaintiff
G abandoned the claim based on the agreement and continued with the claim on the alternative. On 28 March 2007, this court directed the plaintiff and the first defendant to submit under O. 14A Rules of the High Court 1980 (a) the validity and enforceability of the plaintiff's bill and heard together with (b) the
H application (encl. 46) by the first defendant to strike out the plaintiff's claim. Briefly, the business done by the plaintiff for the first defendant was non-contentious work covered by the Sixth Schedule to the Solicitor's Remuneration Order 1991 (SRO 1991). The work done by the plaintiff for the first defendant included but
I was not limited to, the Engineering Procurement Construction and

Commissioning Contract (EPCC) with KTI in the sum of US Dollars 156 million. By a letter dated 22 December 1995, the first defendant informed the plaintiff that the said bill No. 126/12/95 was unrealistic, unreasonable and totally unacceptable and suggested that the plaintiff put up a fresh reasonable and itemized bill. The first defendant contended that the said bill was vague and the plaintiff having failed to submit a duly itemized bill was barred from recovery under s. 124 of the Legal Profession Act 1976 (LPA). The first defendant admitted that the plaintiff had done non-contentious business for the first defendant but alleged that the plaintiff did the work on voluntary basis. The first defendant also applied to strike out the plaintiff's claim.

Held (entering judgment in favour of plaintiff; dismissing first defendant's application to strike out plaintiff's claim):

(1) The work done by the plaintiff for the first defendant, in particular the negotiations with KTI and the drafting of the EPCC Contract were complex in nature and require full time commitment. The plaintiff was a pioneer of sorts in the legal arena for having drafted an EPCC Contract for a private oil refinery in Malaysia. It was clearly of importance to the interests of the first defendant. The value of project, at that time US Dollars 156 million, was not by any means small. It involved skill, labour, specialized knowledge and responsibility on the part of the plaintiff, in particular J.S. Gill whose work judging from the documents prepared, especially the EPCC contract was of high standard. J.S Gill was the sole proprietor of his firm and he shouldered a very heavy responsibility attending to the oil refinery project to the first defendant. It was inconceivable such work was voluntary and philanthropic. Applying the Sixth Schedule to the SRO 1991 to the facts of the case and in particular considering the work done by the plaintiff, the amount of RM2,626,960.70 for which the plaintiff had billed the first defendant was fair and reasonable. (paras 8 & 10)

(2) The first defendant and its directors had prior dealings with the plaintiff and knew that fees would be payable for any business done by the plaintiff for the first defendant. This was evident from the letter dated 22 June 1995 from the first defendant to KTI where the first defendant had asked that the fees payable to M/S Gill & Co be included as part of the total

A contract price. This was an acknowledgment that the plaintiff was entitled to solicitor's fees and the first defendant was liable to pay the fees payable to the plaintiff and wanted to make provisions in the proposed contracts to pay such fees. The allegation by the first defendant that the plaintiff did work
B for the first defendant on a voluntary basis was false. (para 11)

(3) Under s. 126 of the LPA, the first defendant, may, as a matter of course, petition the court at any time within six months from the delivery of the bill of costs for an order to tax the
C bill of costs delivered by the plaintiff. Section 128(2) provides that no order for taxation shall in any event be made after the expiry of one year from the delivery of the bill of costs. The bill of costs in this case was posted 7 December 1995 and received the next day. The first defendant was at all material
D time after delivery of the bill of costs represented by solicitors. But the first defendant did not petition the court for an order to tax the bill of costs delivered by the plaintiff. This action was filed on 12 November 1997, nearly two years later. It was too late for the first defendant to dispute the quantum of the
E bill delivered. (para 14)

(4) The first defendant's contention that the plaintiff had failed to deliver an itemized bill and by reason thereof the plaintiff's claim was barred by s. 124 of the LPA was misconceived.
F Section 121(1) of the LPA applies to contentious business done by the advocate and solicitor that is not the subject of an agreement made pursuant to s. 116 and is not applicable to non-contentious business. In any case, since the matter was not taken to court within 12 months, it was too late in
G the day to rely on that complaint as the first defendant was now barred from challenging the bill of costs since communication requesting itemization or clarification did not have the effect of enlarging or extending the time limited by the LPA to one year. The plaintiff's action was not barred by
H s. 124 of the LPA read with s. 125 of the LPA. (paras 15, 17 & 18)

(5) The plaintiff's bill in this case was delivered to and received by the first defendant on 8 December 1995. The one month period prescribed by s. 124 therefore expired on 7 January
I 1996 and any action taken and maintained by the plaintiff after

7 January 1996 did not require leave of the court. Since the plaintiff commenced this action on 12 November 1997, this was well after the expiry of one month after the delivery of the plaintiff's bill No. 126/12/95. The plaintiff was therefore entitled to payment of the said bill. (para 24)

(6) The first defendant's application to strike out the plaintiff's claim was made after a substantial lapse of time after the pleadings have closed and the plaintiff's action was ready to be set down for trial at the case management stage. It was supported by an affidavit affirmed by the first defendant's solicitor who had no personal knowledge of the matter and who had failed to disclose the source of his information of the facts. The affidavit thus had no probative value in support of the first defendant's application to strike out the plaintiff's claim. (para 27)

(7) Striking out pleadings is a discretionary power to be exercised according to the justice of the case and should be used sparingly and only where a claim in the face of the pleadings is obviously unsustainable. There must be evidence before the court, and not affidavit of little probative value. Since also the matter was at the stage of preparations for final disposal, an application under O. 18 r. 19 of the Rules of the High Court was of little utility. (paras 28 & 29)

Case(s) referred to:

AJ Ariffin, Yeo and Harpal v. Dr Shaharuddin Dato' Haji Aziz [2000] 3 CLJ 430 HC ***(foll)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Jamir Hassan v. Kang Min [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773 HC ***(refd)***

Kumar Jaspal Quah & Aishah v. Wembley Industries Holdings Berhad [1998] 2 CLJ 759 HC ***(refd)***

Re A Solicitor [1955] 3 All ER 253 ***(refd)***

Siew Kuen Williams v. Yong Siew In [1984] 1 CLJ 41; [1984] 2 CLJ (Rep) 450 HC ***(dist)***

Syarikat Gam Bee & Sons Trading & Construction v. Joseph Au Kong Weng [1990] 1 LNS 21 ***(refd)***

United Malayan Banking Corp v. Syarikat Perumahan Luas Sdn Bhd [1991] 1 CLJ 594; [1991] 4 CLJ (Rep) 163 HC ***(dist)***

Vije & Co v. Co-operative Central Bank Ltd [1991] 2 CLJ 1403; [1991] 4 CLJ (Rep) 188 HC ***(refd)***

A *Yau Jiok Hua v. Syarikat Kilang Batu-Bata Chip Siah Sdn Bhd [1999] 1 CLJ 239 HC* ***(dist)***

Legislation referred to:
Legal Profession Act 1976, ss. 116, 121(1), 122, 124(1), (2), 125, 126, 127, 128(2), 129, 130, 131, 132, 133, 134, 135, 136
B Rules of the High Court 1980, O. 14A, O. 18 r. 19

For the plaintiff - JS Gill (Tommy Thomas with him); M/s Putra Gill
For the defendants - Muhammad Faiz Fadzil (Syafuan Zainuddin with him); M/s Aris Rizal Christopher Fernando & Co

C *Reported by Suhainah Wahiduddin*

JUDGMENT

D **Abdul Wahab Patail J:**

[1] By a writ of summons and the statement of claim dated 12 November 1997 the plaintiff claimed against the 1st defendant for the sum of USD2,000,000 or equivalent in Ringgit Malaysia
E due under an agreement on fees; or in the alternative, the sum of RM2,629,960.70 payable under the Plaintiff's bill No. 126/12/95 dated 7 December 1995, posted to the 1st defendant by AR Registered on 7 December 1995 and received by the 1st defendant on 8 December 1995. The plaintiff is a firm of
F advocates and solicitors. By submission on its behalf, the plaintiff abandoned the claim based on the agreement, and continued with its claim on the alternative.

[2] On 28 March 2007 this court directed the plaintiff and the
G 1st defendant to submit under O. 14A RHC 1980 on the following:

a) The validity and enforceability of the plaintiff's bill, and heard together with

H b) The application (encl. 46) by the 1st defendant to strike out the plaintiff's claim.

[3] Briefly the facts not in dispute and relevant to the determination of the validity and enforceability of the plaintiff's bill
I are as follows:

a) The business done by the plaintiff for the 1st defendant is non-contentious work covered by the Sixth Schedule to the Solicitors' Remuneration Order 1991 (SRO 1991).

b) The work done by the plaintiff for the 1st defendant included but is not limited to, the Engineering Procurement Construction and Commissioning Contract (EPCC Contract) with KTI in the sum of US Dollars 156 million.

c) The 1st defendant had in a letter dated 22 June 1995 informed KTI that:

> We understand that you are aware of our views on the draft Contracts and our agreement to include the fees payable to M/S Gill & Co as a part of the total Contract Price. Kindly have these matters settled by KTI before the next round of negotiations which will be handled by Mr. J S Gill of M/S Gill & Co and our Dr. Khin Bo.

d) The plaintiff's bill No. 126/12/95 dated 7 December 1995 for payment of the sum of RM2,629,960.70 together with the accompanying letter dated 7 December 1995 and signed by the plaintiff were delivered to and received by the 1st defendant on 8 December 1995.

e) By a letter dated 22 December 1995, the 1st defendant through its solicitors, informed the plaintiff that the "bill is most unrealistic and unreasonable and is totally unacceptable" to the 1st defendant, and suggested that "(the plaintiff) put up a fresh reasonable and itemized bill following which we may advice (the 1st defendant) to consider" payment.

[4] The bundle of documents and the chronology of events set out the events in which the plaintiff was involved from May 1994 to December 1995, as pleaded in para 4 of the statement of claim. It shows there were a number of meetings including a visit to Australia when the plaintiff's Mr. J. S. Gill discussed the project with BMP Petroleum. Mr. J. S. Gill had by then been in practice for between twelve (12) and thirteen (13) years, having been admitted as an advocate and solicitor on 11 June 1982. There were follow up discussions and correspondence with BMP Petroleum. These are referred to in items numbers 21 and 23 of the chronology of events. There were also meetings with various

A foreign parties including Daqing Petrol from China for which the plaintiff prepared a memorandum of understanding, later amended by Daqing Petrol. These were referred to in items number 14, 15, 16 and 17 of the chronology of events. The plaintiff appears to be involved in the financing aspects of the project and the plaintiff
B arranged a presentation by ABN Amro Bank and were involved with discussions with ABN Amro Bank regarding the financing of the project. There were other meetings with other parties and work done, in some cases involving the other parties referred to in the chronology of events.

C

[5] The major part of the work undertaken by the plaintiff involved dealings with KTI and the negotiations and preparation of documents that followed including the preparation of the EPCC Contract referred to above. This included advise and work on the
D heads of agreement between the 1st defendant and KTI, which the plaintiff did at the request of the 1st defendant's Dato' Zulkifli, perusing and advising on the contract prepared by KTI and the preparation by the plaintiff of the EPCC Contract between the 1st defendant and KTI which were delivered by the plaintiff to the
E 1st defendant and KTI. The plaintiff delivered to KTI a floppy disk containing the EPCC Contract.

[6] The entire process of negotiations and work done by the plaintiff was referred to in paras 20-34 of encl. 5. These
F negotiations were described as "intense". They covered a span of six (6) months from March until August 1995. During this period of about six (8) months, in particular, the plaintiff's Mr. J. S. Gill must have been intensively involved with the work for the 1st defendant in the contract negotiations with KTI including the
G drafting of the EPCC Contract.

[7] The 1st defendant admitted receiving the bill for RM2,629,960,70 but contended the bill was vague and the plaintiff having failed to submit a duly itemized bill is barred from recovery under s. 124 of the Legal Profession Act 1976 (LPA).
H The 1st defendant admitted that the plaintiff did non-contentious business for the 1st defendant but alleged that the plaintiff did the work on voluntary basis.

I

[8] The work done by the plaintiff for the 1st defendant, in particular the negotiations with KTI and the drafting of the EPCC Contract are complex in nature and require full time commitment especially during the six (6) months from March to August 1995. The plaintiff was pioneers of sort in the legal arena for having drafted an EPCC Contract for a private oil refinery in Malaysia, which until then was largely done by foreign legal firms for companies such as Shell, Esso and Petronas. It was not only complex but indeed involved difficult and novel areas and was clearly of importance to the interests of the 1st defendant. The value of the project, at that time US Dollars 156 million is not by any means small. It involved skill, labour, specialised knowledge and responsibility on the part of the plaintiff, in particular Mr. J. S. Gill, whose work judging from the documents prepared especially the EPCC Contract was of high standard. At that time, Mr. J. S. Gill was the sole proprietor of his firm and he shouldered a very heavy responsibility attending to the oil refinery project for the 1st defendant. It is inconceivable such work was voluntary and philanthropic.

[9] The Sixth Schedule to the SRO 1991 provides that the solicitor shall bill such sum "as is fair and reasonable having regard to all the circumstances of the case, and in particular the following circumstances:

a) The importance of the matter to the 1st defendant;

b) The skill, labour, specialized knowledge and responsibility involved on the part of the plaintiff;

c) The complexity of the matter or the difficulty or novelty of the question raised or both;

d) Where money or property is involved, the amount or value thereof;

e) The time expended by the plaintiff;

f) The number and the importance of the documents prepared or perused without regard to length;

g) The place where and the circumstances under which the services or business or any part thereof are rendered or transacted.

[10] Applying the Sixth Schedule to the SRO 1991 to the facts of this case and in particular considering the work done by the plaintiff, the amount of RM2,629,960.70 for which the plaintiff had billed the 1st defendant was fair and reasonable.

[11] The 1st defendant and its directors had prior dealings with the plaintiff and knew that fees will be payable for any business done by the plaintiff for the 1st defendant. This is evident from the letter dated 22 June 1995 from the 1st defendant to KTI where the 1st defendant had asked that the fees payable to M/S Gill & Co be included as a part of the total contract price. This is an acknowledgement that the plaintiff is entitled to solicitor's fees and the 1st defendant is liable to pay the fees payable to the plaintiff and wanted to make provisions in the proposed contracts to pay such fees payable to the plaintiff. The allegation by the 1st defendant in para 2 of the defence that the plaintiff did the work for the 1st defendant on a voluntary basis is false. The letter dated 22 December 1995 from Aris Rizal Christopher Fernando & Co is an acknowledgement of the plaintiff's entitlement to solicitor's fees.

[12] The recovery and taxation of costs due for any business done by an advocate and solicitor is governed by part IX ss. 122-136 of the LPA.

[13] Under s. 128 of the LPA, the 1st defendant may, as a matter of course, petition the court at any time within six months from the delivery of the bill of costs for an order to tax the bill of costs delivered by the plaintiff. Section 128(2) provides that no order for taxation shall in any event be made after after the expiry of one year from the delivery of the bill of costs.

[14] The bill of costs in this case was posted 7 December 1995 and received the next day. The 1st defendant was at all material times after delivery of the bill of costs represented by solicitors. But the 1st defendant did not petition the court for an order to tax the bill of costs delivered by the plaintiff. This action was filed on 12 November 1997, nearly two years later. It is too late now for the 1st defendant to dispute the quantum of the bill delivered. See *Vije & Co v. Co-operative Central Bank Ltd* [1991] 2 CLJ 1403; [1991] 4 CLJ (Rep) 188. In *Syarikat Gam Bee & Sons Trading & Construction v. Joseph Au Kong Weng* [1990] 1 LNS 21

Lamin J (as he then was) dismissed a petition for taxation of costs and allowed a lump sum bill by the solicitor to stand notwithstanding that the matter involved contentious work since more than one year had passed.

[15] The 1st defendant contended that the plaintiff had failed to deliver an itemised bill and by reason thereof, the plaintiff's claim is barred by s. 124 of the LPA. That contention is misconceived since s. 121(1) of the LPA applies to contentious business done by an advocate and solicitor that is not the subject of an agreement made pursuant to s. 116 and is not applicable to non-contentious business.

[16] Denning LJ in *Re A Solicitor* [1955] 3 All ER 253 said: "It need not contain detailed charges as it used to do before 1920. Nor need it contain all the details which the solicitor will have to give, if required, to the Law Society or the taxing master. But I think that it must contain a summarised statement of the work done, sufficient to tell the client what it is for which he is asked to pay".

[17] In any case since the matter was not taken to court within 12 months, then following *Syarikat Gam Bee & Sons Trading & Construction v. Joseph Au Kong Weng*, it is now too late in the day to rely on that complaint as the 1st defendant is now barred from challenging the bill of costs since communication requesting itemisation or clarification does not have the effect of enlarging or extending the time limited by the LPA to one year.

[18] The plaintiff's action is not barred by s. 124 of the LPA which must be read with s. 125 of the LPA. Section 124(1) provides:

> Except as authorized by this Act, no advocate and solicitor shall without leave of the court commence or maintain any action for the recovery of costs due for any business done by him until the expiration of one month after he has delivered to the party to be charged therewith, or sent by post to, or left with him at, his office or place of business, dwelling house or last known place of abode, a bill of costs, which bill shall be signed either by the advocate and solicitor, or in the case of a partnership, by any of the partners, either in his own name or with the name or style of the partnership, or by another advocate and solicitor employed by

A the first named advocate and solicitor or the partnership, or be enclosed in or accompanied by a letter, signed in like manner, referring to the bill.

[19] Section 124(2) provides:

B Where a bill is proved to have been delivered in compliance with subsection (1) it shall not be necessary in the first instance for the advocate and solicitor to prove the contents of the bill and it shall be presumed until the contrary is shown to be a *bona fide* bill complying with this Act.

C **[20]** Section 125 provides:

The Court may authorize an advocate and solicitor to commence an action for recovery of his costs and also refer his bill of costs for taxation by the Registrar, although one month has not expired D from the delivery of the bill, upon proof to its satisfaction that any party chargeable therewith in about to quit Malaysia, or to have a receiving order made against him, or to compound with his creditors or to take any other steps or do any other act which in its opinion would tend to defeat or delay the advocate and solicitor in obtaining payment.

E **[21]** The 1st defendant relies on the interpretation placed on s. 124 of the LPA in the case of *Kumar Jaspal Quah & Aishah v. Wembley Industries Holdings Berhad* [1998] 2 CLJ 759 to support the 1st defendant's contention that the plaintiff's claim is barred F by s. 124 of the LPA. In *Kumar Jaspal Quah & Aishah v. Wembley Industries Holdings Berhad*, KL Rekhraj J dismissed a creditor's winding up petition presented to recover costs due to an advocate and solicitor, saying in reference to s. 124(1):

G Be that as it may; and without going into the merits or demerits of the petition; the petitioners the petition has to be dismissed on the only ground; that it has been prematurely presented, as section 124 of the said Legal Profession Act 1976, bars an advocate and solicitor to sue for costs unless the leave of the court has first been obtained. The section reads "Except as H authorised by this Act, no advocate and solicitor shall without the leave of the court commence or maintain any action for the recovery of any costs due for any business done by him until the expiration of one month after he has delivered to the party to be charged therewith, or sent by post to, or left with him at his I office or place of business, dwelling house or last known place of above, a bill of costs, ...

As the petitioners have not satisfied this court of their having complied with the requirements of s. 124 of the Legal Profession Act, in their having obtained the leave of the court, the said petition as filed is premature, and accordingly struck off with cost.

[22] However, KC Vohrah, J (as he then was) in the case of *AJ Ariffin, Yeo and Harpal v. Dr Shaharuddin Dato' Haji Aziz* [2000] 3 CLJ 430 is correct and should be followed:

It is unfortunate that s. 124(1) comprises one long sentence, and as sometimes happens with long sentences, ambiguity is created in what the provision sets out to regulate.

The provision of sub-s (1) gives the impression that an advocate and solicitor must first obtain leave from the High Court before suing for the recovery of any costs due to him from a person for services rendered to him. A closer reading of the sentence, however, show that that impression is unjustified. What it provides is that (except as authorized by the Legal Profession Act 1976) no advocate and solicitor shall commence or maintain any action for the recovery of costs due to him from a person until he has delivered or posted to that person or left with him a bill of costs for business done for him and after the expiration of one month from the date of such service of the bill of costs on him. The bill that is sent must comply with the terms spelt out in the latter part of sub-s (1).

Leave, however, is needed if the advocate and solicitor chooses to commence or maintain any action before the expiry of the one month period which runs from the date of delivery or posting to the person or leaving him with the bill of costs for business done for him.

My attention has been drawn to *Kumar Jaspal Quah & Aishah v. Wembley Industries Holdings Berhad* but with respect I am unable to agree with the interpretation placed on s. 124(1) by that case and I have respectfully decline to follow it.

[23] This court is persuaded by the fact the interpretation in *AJ Ariffin, Yeo and Harpal (suing as a firm) v. Dr Shaharuddin bin Dato' Haji Aziz* is reasoned, and the learned judge had the benefit of considering the decision in *Kumar Jaspal Quah & Aishah v. Wembley Industrial Holdings Berhad*.

[24] The plaintiff's bill in this case was delivered to and received by the 1st defendant on 8 December 1995. The one month period prescribed by s. 124 therefore expired on 7 January 1996, and any action taken and maintained by the plaintiff after 7 January 1996 does not require leave of the court. Since the plaintiff commenced this action on 12 November 1997, this is well after the expiry of one month after the delivery of the plaintiff's bill No. 126/12/95 dated 7 December 1995 for payment of the sum of RM2,629,960.70.

[25] The court accepts that *Yau Jiok Hua v. Syarikat Kilang Batu-Bata Chip Siah Sdn Bhd* [1999] 1 CLJ 239, *United Malayan Banking Corp v. Syarikat Perumahan Luas Sdn Bhd* [1991] 1 CLJ 594; [1991] 4 CLJ (Rep) 163; *Siew Kuen Williams v. Yong Siew In* [1984] 1 CLJ 41; [1984] 2 CLJ (Rep) 450 are inapplicable since they dealt with contentions and not non-contentious business.

[26] The court holds plaintiff is, therefore, entitled to payment of his bill No. 126/12/95 dated 7 December 1995 in the sum of RM2,629,960.70 delivered to the 1st defendant on 8 December 1995 for the reasons above and that judgment should be entered in favour of the plaintiff, and the 1st defendant be ordered to pay to the plaintiff the said sum of RM2,629,960.70 with interest at the rate of 8% per annum from 8 January 1996 until full payment, and costs to be taxed.

1st Defendant's Application To Strike Out

[27] The 1st defendant's application to strike out of the plaintiff's claim was made after a substantial lapse of time after the pleadings have closed and the plaintiff's action is ready to be set down for trial at the case management stage (see *Jamir Hassan v. Kang Min* [1991] 3 CLJ 2490; [1991] 2 CLJ (Rep) 773). It is supported by an affidavit affirmed by Muhammad Faiz bin Fadzil, the 1st defendant's solicitor who has no personal knowledge of the matter and who had failed to disclose the source of his information and belief for the facts that are alleged in affidavit. By reason thereof, the affidavit is of no probative value in support of the 1st defendant's application to strike out the plaintiff's claim.

[28] Striking out of pleadings is a discretionary power to be exercised according to the justice of the case and should be used sparingly and only where a claim on the face of the pleadings is obviously unsustainable (see *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7). There must be evidence before the court, and not affidavit of little probative value. Since also the matter is at the stage of preparations for final disposal, an application under O. 18 r. 19 of the Rules of the High Court is of little utility.

[29] In the circumstances, the 1st defendant's application to strike out the plaintiff's claim was dismissed with costs.